91-1211

Supreme Court, U.S.
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No. 91-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

CHARLENE EVANS,

Petitioner,

v.

CITY OF EVANSTON AND
DIRECTOR OF PERSONNEL, CITY OF EVANSTON

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is an enhancement (or "multiplier") over the lodestar fee, to be paid from a common fund produced by litigation, permissible in Title VII employment discrimination class actions?

2. May a district court in a class action Title VII case award fees from the common fund created by the litigation?

3. Are plaintiffs who ultimately prevail in a Title VII case entitled to fees for services in defending a cross-appeal which resulted in a vacature and remand for reconsideration?

4. Does the principled application of standards consistent with the legislative purpose of Title VII permit an appellate court to defer to a district court's unexplained, across-the-board reduction of an attorney's time actually expended in the successful prosecution of a Title VII class action?

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CITY OF EVANSTON AND
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Charlene Evans respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 14, 1991.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-13) affirming the district court's unreported decisions (App. 16-18, 19-20) on attorneys' fees is reported at 941 F.2d 473 (7th Cir. 1991).

The decision of the district court denying a motion to dismiss (App. 21-26) is reported at 621 F.Supp. 710 (N.D.Ill.

1985). The district court's order granting class certification (App. 27-34) is unreported. The district court's decision on the merits (App. 35-47) is reported at 695 F.Supp. 992 (N.D.Ill. 1988). The first opinion of the court of appeals is reported at 881 F.2d 382 (7th Cir. 1989).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 14) was entered on February 21, 1989; petitioner's timely petition for rehearing was denied by the court of appeals on October 24, 1991. (App. 15.)

STATUTES INVOLVED

This case involves 42 U.S.C. §2000e-5(k):

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

In 1983, petitioner Charlene Evans applied for a firefighter position with the City of Evanston. Evans was turned down because she was unable to pass the City's pre-employment physical agility test. *Evans v. Evanston,* 695 F.Supp. 922, 923 (N.D.Ill. 1988). (App. 35.)

Evans filed a timely charge of employment discrimination with the EEOC and then filed this action, complaining that the physical agility test had a disparate impact on women. After

the district court denied defendants' motion to dismiss (App. 21-26) and granted plaintiffs' motion for class certification (App. 27-34), plaintiffs moved for summary judgment, arguing, *inter alia*, that "the City has absolutely no evidence that the passing time it used in 1983 is in any way related to predicting job performance." (Record Item No. 47 at 4.) Defendants argued "that upon trial of this cause, the defendants will produce evidence to show that persons who completed the firefighter physical agility test in 1983 in 767 seconds or less are likely to perform better as firefighters than persons who receive lower scores." (Record Item No. 52, §4.01.) After extended deliberation, the district judge denied the motion for summary judgment without opinion.

The case was tried in April of 1988. The district court found that the statistical evidence established a prima facie case of disparate impact discrimination under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and its progeny. *Evans v. Evanston*, 695 F.Supp. at 925-26. (App. 39.) The district court concluded that the test is content valid, 695 F.Supp. at 928 (App. 41-43), but found in favor of the plaintiff class on the ground that the passing score "was not reasonable and consistent with normal expectations of acceptable proficiency in firefighting." *Id.* at 929 n.3. (App. 46 n.3.)

The district court awarded backpay to the class but declined to grant any hiring relief. 695 F.Supp. at 929-30. (App. 46-47.) Plaintiffs appealed to seek review of the remedial aspects of the decree and the City cross-appealed to challenge the district court's decision on the merits.

On appeal, the Seventh Circuit held that this Court's intervening decision in *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989) required a remand for reconsideration of the district court's decision on the merits. *Evans v. Evanston*, 881 F.2d 382, 385 (7th Cir. 1989). (App. 48-53.) The Court

of Appeals rejected plaintiffs' challenge to the district court's refusal to grant hiring relief, finding that the district judge had been "within his remedial discretion in declining to take this step." Id. (App. 52.)

On remand, after permitting the City to offer further evidence on the reasonableness of the cut-off score, the district judge re-entered his findings in favor of the plaintiff class. (App. 54-55.)

Following entry of the district court's decision on remand, plaintiffs filed their petition for fees, seeking an enhancement of the lodestar fee because of the contingent nature of the case. The district court refused to award any compensation for work that had been done on the first appeal (App. 16, 19) and accepted defendants' arguments that plaintiffs had expended too much time on the summary judgment papers and on the post-trial findings of fact. The district judge concluded that 63 hours (instead of 78 hours) should have been expended on the motion for summary judgment (App. 17) and that 35 hours (instead of 61 hours) should have been expended in preparing post-trial findings of fact. (Id.) The district judge then concluded that these findings of excessive time warranted a 70% across the board reduction in total time. (App. 17.) The district judge also declined to award an enhancement over the lodestar to be paid by defendants (App. 17) and refused to require that any fees be paid out of the eighty thousand dollar common fund created by the class backpay award.[1] (App. 19.)

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1. The district judge agreed to stay disbursement of twenty-five percent of the common fund pending the final disposition of attorney's fee issues.

On appeal, a panel of the the Seventh Circuit affirmed the district court's order in all respects. (App. 1-13.)

REASONS FOR GRANTING THE WRIT

The issues presented by this case are of substantial significance to Congress' use of fee shifting statutes to encourage the enforcement of federal law through lawsuits filed by private persons. The holding of the court of appeals that, absent "exceptional success," there cannot be an enhancement of the lodestar fee — an enhancement to be paid either by the defendant or from the common fund created by the litigation — is in direct conflict with decisions of other circuits.

In addition, the conclusion that, even though plaintiffs ultimately prevailed, fees cannot be awarded for defending a cross-appeal that resulted in a vacature and remand for reconsideration, departs from decisions of this Court and is in conflict with decisions in other circuits. Furthermore, deference to the district court's across-the-board reduction of attorney time on the unexplained conclusion that the time involved in two activities was "excessive" incorporates the "chancellor's foot" standard into fee determinations.

CONTINGENCY MULTIPLIERS

The Court's several opinions in *Pennsylvania v. Delaware Valley Citizen's Council (II)*, 483 U.S. 711 (1987), have engendered confusion among the lower federal courts.

In *Delaware Valley (II)*, five members of the Court agreed that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions." 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment); see also *id.* at 739

(Blackman, J., dissenting, joined by Brennan, Marshall, & Stevens, JJ.) ("Congress envisoned that district courts would take the fact of contingency into account when calculating a reasonable attorney's fee"). Four members of the Court expressed the contrary view that "multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee shifting statutes." 483 U.S. at 727. (White, J., joined by Rehnquist, CJ., and Powell and Scalia, JJ.)

The Court of Appeals for the District of Columbia Circuit, has read *Delaware Valley (II)* as absolutely foreclosing any enhancement for contingency. *King v. Palmer*, ___ F.2d ___ (No. 89-7027, D.C.Cir., December 13, 1991) (en banc). In its decision in this case, the Seventh Circuit read *Delaware Valley (II)* as permitting an enhancement for contingency only when there was "exceptional success." (App. 9.)

Decisions in other circuits permit an enhancement for contingency on a showing that "without an adjustment for risk the prevailing party would have faced substantial difficulties in finding counsel in the local or relevant market" and that enhancement for contingency reflects "the difference in market treatment of contingent fee cases as a class, rather than . . . the 'riskiness' of any particular case." *Fadhl v. City of San Francisco*, 859 F.2d 649, 650 (9th Cir. 1988), quoting *Delaware Valley (II)*, 483 U.S. at 731 (O'Connor, J., concurring). See, e.g., *Dague v. City of Burlington*, 935 F.2d 1343, 1359-60 (2d Cir. 1991); *Kelly v. Matlack, Inc.*, 903 F.2d 978, 986 (3d Cir. 1990); *Spell v. McDaniel*, 852 F.2d 762, 765-66 (4th Cir. 1988); *Leroy v. City of Houston*, 831 F.2d 576, 583 (5th Cir. 1987); *Perotti v. Seiter*, 935 F.2d 761, 765 (6th Cir. 1991); *Gilbert v. City of Little Rock*, 867 F.2d 1063, 1067-68 (8th Cir. 1989); *Wulf v. City of Wichita*, 883 F.2d 842, 876 (10th Cir. 1989); *Davis v. Locke*, 936 F.2d 1208, 1215 (11th Cir. 1991).

The primary argument against an upward adjustment for risk is that "enhancing fees for risk of loss forces losing defendants to compensate plaintiff's lawyers for not prevailing against defendants in other cases." *Delaware Valley (II)*, 483 U.S. at 725 (White, J.) This argument is inapplicable when, as here, compensation for risk is sought from the common fund achieved by the litigation.

The Court of Appeals for the Ninth Circuit has found that a doubling of the lodestar is necessary to encourage lawyers in the San Francisco community to undertake contingent fee Title VII cases. *Fadhl v. City of San Francisco*, 859 F.2d 649, 650 (9th Cir. 1988). This finding is consistent with "[t]he experience of the marketplace . . . that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." Berger, Court Awarded Attorneys' Fees: What is "Reasonable?", 126 U.Pa.L.Rev. 281, 324-25 (1977).

In the view of the Seventh Circuit, no portion of the common fund is available for attorney's fees because fees were being awarded under a fee shifting statute. (App. 11-12.) This reasoning is at odds with the policy underlying the common fund doctrine that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney fee from the fund as a whole . . ." *Boeing Company v. Van Gemert*, 444 U.S. 472, 478-81 (1980).

If allow to stand, the decision of the Seventh Circuit in this case sends a clear signal to attorneys to steer clear of Title VII class actions and instead focus on securities and antitrust litigation, where the Seventh Circuit recognizes the need for contingency multipliers. *Harman v. Lymphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991). This result undermines Congress' use of fee shifting statutes to encourage the

enforcement of federal law through lawsuits filed by private persons.

The Court should establish a uniform, clear, and principled standard to resolve the conflicts between the courts of appeals as to the whether and under what circumstances an enhancement (or "multiplier") over the lodestar fee is permissible in Title VII employment discrimination class actions from a common fund produced by the litigation.

PREVAILING PARTY ON THE FIRST APPEAL

There is no dispute that plaintiffs are the prevailing party in this litigation. By obtaining a new scoring system and $80,000 in backpay, plaintiffs succeeded on "significant issue[s] in litigation which achieves some of the benefit sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Texas State Teachers v. Garland Independent School Dist.*, 109 S.Ct. 1486, 1493 (1989). Nonetheless, the court of appeals held that fees could not be awarded for any of the work involved in the first appeal.[2] (App. 3-4.) In the view of the Seventh Circuit, because defendant's cross-appeal resulted in a remand for reconsideration in light of *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989), plaintiffs were not entitled to fees for any of the work in the first appeal, even though the district judge on remand reaffirmed his findings in favor of plaintiffs.

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2. In the first appeal (App. 48-53), plaintiffs sought review of the district court's refusal to grant any hiring relief, while defendant cross-appealed to challenge the district court's decision in favor of the plaintiffs on the merits.

The Seventh Circuit's construction of the definition of "prevailing party" in this case is in conflict with the decision of the Eleventh Circuit in *Lattimore v. Oman Construction*, 868 F.2d 437 (11th Cir. 1989). There, in an initial appeal, a fee award had been vacated and remanded for reconsideration. *Lattimore v. Oman Construction*, 832 F.2d 560 (11th Cir. 1987). Fees were awarded in *Lattimore* for work done on the first appeal because the plaintiff prevailed on remand. *Lattimore v. Oman Construction*, 868 F.2d at 440 (11th Cir. 1989). Plaintiffs likewise prevailed on remand in this case.

A fee paying client would have authorized an appeal from the district court's decision on the merits granting backpay to the class but refusing to provide any hiring remedy. An order providing for a new scoring system is a hollow remedy for a person who failed that test ten years before. Here, counsel had a duty to the class to seek review of the district court's refusal to award any hiring relief.

A fee paying client would also have agreed to pay counsel to defend the cross-appeal, which placed plaintiffs' victory in jeopardy. A fee paying client could have paid counsel either on a periodic basis or at the end of the case out of the back-pay award.

Even though plaintiffs ultimately prevailed, the Seventh Circuit held that attorney's fees could not be awarded from any source for prosecuting the first appeal or for defending against the cross-appeal. This decision, which is at odds with this Court's definition of "prevailing party" and is in conflict with decisions in other circuits, should be reviewed by this Court.

EXERCISING DISCRETION AND THE "CHANCELLOR'S FOOT"

This Court's repeated admonition that fee determinations involve discretionary judgments[3] should not relieve appellate courts of reviewing district court fee decisions. As in the award of backpay, "when Congress invokes the Chancellor's conscience to further transcendant legislative purposes, what is required is the principled application of standards consistent with these purposes and not 'equity [which] varies like the Chancellor's foot.'" *Albermarle Paper Company v. Moody*, 422 U.S. 405, 417 (1975),

In this case, the district judge concluded that 70% of the time actually expended in preparing post-trial findings of fact and summary judgment papers was reasonable. The district judge stated that 35 (rather than 61) hours should have been required to prepare proposed findings of fact and that 63, rather than 78 hours, was "an appropriate expenditure of time" for preparation of a summary judgment motion. (App. 17.) The district judge applied this 70% factor to all of the time that counsel had expended in the case. (Id.)

A district judge's determination that a pleading should have been prepared in 35 rather than 61 hours "poses serious risks of unfairness . . . in hindsight on whether it was reasonable for the lawyer handling a case to have expended x rather than y hours of time on some aspect of a case. Those difficulties and risks are magnified when the necessarily imprecise evaluations of that nature are then extrapolated to

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3. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984);

determine the reasonableness of the *total* time spent on the case." *Eirhart v. Libbey-Owens-Ford Co.*, 774 F.Supp. 454, 460 n.3 (N.D.Ill. 1991).

Other than to state his conclusion that too much time had been expended in preparing summary judgment papers and post-trial findings, the district judge failed to explain the basis for his 70% across-the-board reduction, Absent some explanation,[4] an appellate court should not defer to such drastic reductions in time.

An across-the-board reduction in time, as in this case, is arbitrary and punishes efficiency:

- Should 60 hours of trial time have been concluded in 42 hours?

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4. E.g., that particular work was duplicative, *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1160 (7th Cir. 1989); that attorneys had billed for overlapping services, *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714, 715 n.1 (6th Cir. 1 978); that there were "large numbers of hours for strategy and other conferences," *Daggett v. Kimmelman*, 811 F.2d 793, 797 (3d Cir. 1987) (10% reduction) *opinion following remand*, 864 F.2d 1122 (3d Cir. 1989); that an excessive amount of time had been spent on research in a simple case, *Tomazzoli v. Sheedy*, 804 F.2d 93, 97 (7th Cir. 1986) (117.25 hours cut back to 80 hours in case settled for $5,000 on day of trial); that a case was not properly staffed, *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980). (22% reduction approved because "inadequate partner time had been spent in the case"); that the total time was grossly excessive, *Brown v. Stackler*, 612 F.2d 1057 (7th Cir. 1980); or that time records are inadequate. *Dutchak v. Central States Pension Fund*, 932 F.2d 591, 597 (7th Cir. 1991)

- Should two depositions, that required 4.5 hours (including preparation), have been completed in 3.15 hours?
- Should another deposition, that required 3 hours (including preparation), have been completed in 2.1 hours?
- Should a deposition of the City's expert, which required 1 hour, have been completed in 42 minutes?
- Should counsel have been able to draft a judgment order in 21 minutes, rather than the 30 minutes billed?
- Should a telephone call, shown by a time entry of 1.8 minutes, have been completed in 1.26 minutes?
- Did plaintiff's counsel spend too much time attending depositions taken by defendants?

The Third Circuit has expressly held that "[w]e need more reasoning than 'they are excessive' to review the district court's decision [to reduce hours]." *Rode v. Dellarciprete,* 892 F.2d 1177, 1187 (3d Cir. 1990) The Fifth Circuit reached a similar result in *Sims v. Jefferson Downs Racing Ass'n,* 778 F.2d 1068, 1084 (5th Cir. 1985) The decision of the Seventh Circuit in this case is in conflict. Certiorari should be granted to resolve this conflict.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 90-3456

CHARLENE EVANS, Individually and on Behalf of a Class,

Plaintiff-Appellant,

v.

CITY OF EVANSTON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 2718—**James B. Zagel**, *Judge.*

ARGUED JUNE 7, 1991—DECIDED AUGUST 14, 1991

Before COFFEY, FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* Charlene Evans brought suit to challenge the 1983 physical fitness test administered by the Evanston Fire Department, alleging that the test had a disparate impact on women in violation of Title VII. The district court agreed in part, holding that though the skills Evanston tested were reasonably related to those required by a firefighter, the passing score Evanston selected was arbitrary. *Evans v. City of Evanston*, 695 F. Supp. 922 (N.D. Ill. 1988). After Evans appealed the portion of the decision that was adverse to her, Evanston chose to cross-appeal the portion of the decision that went against it.

On appeal, Evans lost and Evanston won. *Evans v. City of Evanston*, 881 F.2d 382 (7th Cir. 1989). In Evans' first direct appeal we agreed with the district court and Evanston that the test the City used was a reasonable predictor of fitness to be a firefighter. Our decision on Evanston's cross-appeal, however, was to remand the case to the district court to reexamine its decision with respect to the passing score in light of the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), which placed the burden of persuasion in the business-justification phase of a Title VII case on the plaintiff. *See id.* at 2126. We agreed with the district court's choice of remedy for the disparate impact on women caused by the arbitrary scoring of the test, and wrote that if the result on remand was a second finding that the passing score Evanston adopted violated Title VII, the district court should again require the City to pay damages rather than ordering it to hire the women who would have passed a fairly scored test.

On remand, the district court revisited its earlier decision, and again concluded that the passing score Evanston selected was arbitrary and had a disparate impact on women in violation of Title VII. In accordance with our opinion, the district court rejected the adoption of a hiring remedy because of the preliminary screening role the physical fitness exam plays in the lengthy process of becoming a firefighter in Evanston. It opted instead to award damages, and ordered the City to pay the plaintiff class approximately $80,000.

Remaining before the district court, and now on appeal, was the question of attorney's fees, which under Title VII a district court, "in its discretion . . . may allow the prevailing party." 42 U.S.C. § 2000e-5(k). The two lawyers who made up Evans' legal team submitted a fee petition seeking compensation for 605 hours, 458 hours for senior counsel and 147 for junior counsel. Plaintiffs' counsel also sought an adjustment above the lodestar figure to reflect their contingent-fee representation of Evans, and later requested a share of the damages received by the class. The

district court made a variety of downward adjustments which, taken together, reduced the number of hours for which fees would be awarded to 322½, 248½ for senior counsel and 74 for junior counsel. It also denied the requests for an adjustment above the lodestar figure and a share of the recovery. Plaintiffs' counsel appeal, challenging various aspects of the district court's decision reducing their fees or refusing to increase them. We affirm.

I. FEES FOR THE FIRST APPEAL

The district court denied plaintiffs' counsel any fees for the time spent contesting the first appeal, observing that "[t]he plaintiff did not prevail on any issue on appeal. The defendant did prevail on the principal issue it raised." Memorandum Opinion and Order, Aug. 30, 1990 ("Mem. Op."), at 1. The effect of this decision was to disallow 86 hours billed by senior counsel and 42 billed by junior counsel. In this appeal, plaintiffs' counsel argue that the district court's disallowance of fees for the appeal was error. They assert that they were justified in pursuing an appeal from the district court's initial decision because that decision failed to afford plaintiffs the remedy they sought, jobs as firefighters in Evanston. They also argue that when they decided to appeal, Evanston cross-appealed, forcing the plaintiffs to defend even the limited victory they had obtained in the trial court. Evanston responds that after the district court released its first opinion, the city council resolved not to appeal the decision. When, however, plaintiffs chose to appeal, the city chose to cross-appeal. Since Evans and her co-plaintiffs prevailed on no issue in the appeal or cross-appeal, the City argues, their counsel should receive no fees for the time they spent briefing and arguing the appeal.

As the Supreme Court wrote in *Hewitt v. Helms*, 482 U.S. 755, 759 (1987), "[i]n order to be eligible for attorney's fees under [Title VII],[1] a litigant must be a 'prevail-

[1] *Hewitt v. Helms* was a case brought under 42 U.S.C. § 1983, and the fee shifting statute at issue in that case was 42 U.S.C.

(Footnote continued on following page)

ing party'. . . . Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *See also Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989); *Libby by Libby v. Illinois High School Ass'n*, 921 F.2d 96, 98 (7th Cir. 1990). In this case, all the plaintiffs received on appeal was a reversal and remand on the one issue upon which they had achieved success in the district court. *See Evans v. City of Evanston*, 881 F.2d at 385 (remanding issue of test scoring to district court for reconsideration in light of *Wards Cove*). "[T]he relevant inquiry" for determining whether fees should be awarded for an appeal "is simply whether the party seeking compensation substantially prevailed at the appellate level." *Kelley v. Metro. County Bd. of Educ.*, 773 F.2d 677, 682 (6th Cir. 1985) (*en banc*), *cert. denied*, 474 U.S. 1083 (1986). In this case, the result of that inquiry is decidedly adverse to plaintiffs' counsel.

Plaintiffs' counsel argue that the district court's resolution of the question of awarding fees for work done on the first appeal ignores our decision in *Ustrak v. Fairman*, 851 F.2d 983 (7th Cir. 1988). To the contrary, however, *Ustrak* compels us to conclude that the district court correctly declined to grant fees for the first appeal. We observed in *Ustrak* that "[a] civil rights plaintiff who, having won a judgment in the district court, appeals, seeking a greater victory—and fails utterly in his appeal, will be hard pressed to demonstrate an entitlement to his attorney's fees on appeal, even though he remains the prevailing party in the underlying litigation." 851 F.2d at 990.

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[1] *continued*

§ 1988, not 42 U.S.C. § 2000e-5(k). However, "[i]t is well established that 42 U.S.C. § 1988 was patterned after § 2000e-5(k). Decisions under § 1988, with a few noteworthy exceptions not applicable to this case, govern decisions under § 2000e-5(k)." *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1175 n.8 (6th Cir. 1990); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (*per curiam*).

In this case, plaintiffs' counsel did win—in part—in the district court, did appeal, and did "fail utterly" on appeal. We agree with the district court that plaintiffs' counsel do not merit fees for their unsuccessful efforts in the first appeal.

II. REDUCTION IN HOURS

The next issue on appeal concerns the district court's 30 percent reduction in the hours claimed by plaintiffs' counsel. The trial judge arrived at this reduction through the use of a method he described as follows:

> It is my practice to conduct a close examination of two or three particular tasks performed by a counsel claiming fees and to apply the findings made there to the remaining hours claimed. Counsel are informed of this practice and counsel opposing the fee is permitted to suggest the specific work that ought to be scrutinized. This sampling procedure operates on the reasonable premise that a lawyer's billing and work habits and practices are, in fact, habits and practices, which will uniformly apply to all of the lawyer's work.

Mem. Op. at 1-2.

In this case, Evanston proposed that the district court scrutinize two aspects of the work plaintiffs' counsel performed, the preparation of a summary judgment motion and post-trial findings of fact. Plaintiffs' counsel claimed 78 hours for the summary judgment motion and 61 hours for the findings of fact. The district court found that reasonable time estimates for these two tasks were 63 hours and 35 hours respectively. Adding the allowed time for the two tasks and dividing it by the claimed time for the two tasks, the district court arrived at the figure of 70 percent.[2] It applied this percentage to the hours senior and junior counsel claimed (after subtracting the time at-

[2] 78 + 61 = 139; 63 + 35 = 98. 98/139 = .71. The district court apparently rounded down from .71 to .70.

tributable to the first appeal), 372 hours for senior counsel and 105 hours for junior counsel. The district court ruled that 260 hours of senior counsel's requested time and 74 hours of junior counsel's requested time would be allowed. It then multiplied these figures by the billing rates it selected for junior and senior counsel to arrive at the lodestar figure.

On appeal, plaintiffs' counsel argue that the district court's across-the-board 30 percent reduction was an abuse of discretion. They contend that the time they spent on the two activities sampled by the district court was reasonable, and that the district court's methodology in calculating the across-the-board reduction goes beyond the broad discretion afforded district courts in deciding fee awards.

"For some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). This case presents one of them. Title VII's fee-shifting statute provides that the district court may allow the prevailing party fees "in its discretion." 42 U.S.C. § 2000e-5(k). Pursuant to this statutory command, we limit our review of a district court's decision to award attorney's fees to the question of whether the district court abused this discretion. *See, e.g., Eddleman v. Switchcraft*, 927 F.2d 316, 317-18 (7th Cir. 1991); *Jardien v. Winston Network*, 888 F.2d 1151, 1158 (7th Cir. 1989); *Nanetti v. University of Illinois at Chicago*, 867 F.2d 990, 995 (7th Cir. 1989). Fee calculation is an imprecise science, and the numbers arrived at by a district court, figured to the last penny, may be seen by counsel and others to convey an "impression of exactness" that is illusory, even "delusive." *Ustrak*, 851 F.2d at 989; *see also Tomazzoli v. Sheedy*, 804 F.2d 93, 97 (7th Cir. 1986) (*per curiam*) ("There is no one correct formula for determining a fee award, and therefore the district court's calculation is anything but an arithmetical exercise.").

Likewise the methodology used to calculate those figures, which represent no more than the learned guesses of dis-

trict court judges, based on their extensive experience overseeing litigation and observing lawyers, as to how to go about determining what compensation an attorney deserves for her efforts in a given case. "There is no precise rule or formula for making these determinations," and a district court "necessarily has discretion" in choosing among the various alternative methods. *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983). So long as the method selected is not arbitrary and is likely to arrive at a fair fee, it will not be disturbed on appeal.

We are unable to conclude that the sampling technique employed by the district court in this case falls below this standard. As the district court correctly observed, a lawyer's work habits, while not immutable, are likely to be consistent for the duration of a case litigated over the course of a few years. We note that it might be a better practice to allow both the party opposing the fee award *and* the party seeking fees to suggest the individual tasks to be sampled. In this case, however, the record shows that the district court allowed counsel for the plaintiff an opportunity to respond to the proposed reduction, albeit after it had already been suggested by the district court. Plaintiffs' counsel availed themselves of this opportunity, challenging the 30% reduction as "arbitrary and unreasonable," but not suggesting that the district court reconsider the reduction by including in its sample aspects of the work they performed in the course of the litigation other than those proposed by the City.[3] Because the method employed by the district court was reasonable, and because plaintiffs' counsel were given ample warning of the method and a chance to respond when it was applied to them, we affirm the district court's 30 percent across-the-board reduction in the number of hours billed.

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[3] The district court was responsive to other arguments made in the motion to reconsider: though it reaffirmed the 30 percent reduction in the number of billable hours, it also increased the billing rate for senior counsel by twenty-five dollars per hour, to $200.

As to the specific findings made by the district court concerning the reasonable number of hours allowable for the summary judgment motion and findings of facts, we repeat what we wrote in *Ustrak*:

> "If ever there was a case for reviewing the determinations of a trial court under a highly deferential version of the 'abuse of discretion' standard, it is in the matter of determining the reasonableness of the time spent by a lawyer on a particular task in a litigation in that court." 851 F.2d at 987.

The district court explained its conclusion as to each of the two pleadings, and took "into consideration that plaintiff here bore the burden of proof . . . and that one who bears such a burden may well be required to work a significantly larger number of hours" than one who does not. Mem. Op. at 2. It also situated each of the two pleadings in the context of the litigation as a whole in examining the question of the amount of time they merited. This discussion satisfies the requirement that the district court " 'provide a concise but clear explanation of its reasons for the fee award.' " *Eddleman*, 927 F.2d at 316 (quoting *Hensley*, 461 U.S. at 437). Because the district court explained how it arrived at the number of hours it identified as reasonable for the two pleadings, and because the number it identified was within the range of reasonable estimates, we conclude that it was well within its discretion in fixing the allowable number of hours for the two pleadings it examined in calculating the reduction.

III. FEE ENHANCEMENT FOR CONTINGENCY

In its fee petition, plaintiffs' counsel sought an enhancement above the lodestar figure to reflect the risk they assumed in taking this case and expending their time and resources knowing that they would only be paid for their efforts if they succeeded. The district court rejected counsel's request for an enhancement above the lodestar figure because of the limited success plaintiffs enjoyed. On ap-

peal, plaintiffs' counsel argue that in focusing on the degree of success plaintiffs achieved rather than on compensating them for the risk they assumed the district court applied an incorrect legal standard. Evanston responds that the district court correctly stated the applicable legal principle used to decide when an enhancement for contingency is appropriate, and that the limited success plaintiffs gained in this case does not warrant increasing the fees their attorneys receive.

We agree with the district court's view that the lodestar figure, the number of reasonably expended hours multiplied by an appropriate fee, is the "centerpiece of fee awards," *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989), and that contingency enhancements above the lodestar figure are appropriate only in "cases of exceptional success." *Hensley*, 461 U.S. at 435. *See also Blum v. Stenson*, 465 U.S. 886, 901 (1984); *cf. Pennsylvania v. Delaware Valley Citizens' Counsel*, 483 U.S. 711, 728 (plurality opinion of White, J.) ("[P]ayment for the time and effort involved—the lodestar—is presumed to be the reasonable fee authorized by [42 U.S.C. § 1988], and enhancement for the risk of non-payment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts.").

As the district court concluded, this case was not one in which the plaintiffs enjoyed "exceptional success." Rather they lost on one of their two Title VII claims, their challenge to the validity of Evanston's physical fitness test as a predictor of the strength, agility, and speed needed to be a firefighter. Plaintiffs achieved success in their challenge to Evanston's system of scoring its test, but the district court denied them the relief they sought, employment as firefighters in Evanston, opting instead for the more limited remedy of damages. Given the incomplete victory plaintiffs obtained in the district court, we can safely say that the district court did not abuse its discretion in concluding that no enhancement in the fees awarded plaintiffs' counsel was appropriate.

IV. SHARE IN THE RECOVERY

After the district court denied its motion for a fee enhancement to reflect contingency, plaintiffs' counsel filed a motion to reconsider in which they sought a quarter of the approximately $80,000 that the district court awarded the plaintiff class. The district court denied the request.

The request by plaintiffs' counsel for a share in the recovery obtained by their clients poses the question of whether a district court in a class action Title VII case may award fees from the common recovery derived from the defendants. The issue rests at the intersection between a common-law doctrine and a series of legislative enactments. Under the common-law doctrine, "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing v. Van Gemert*, 444 U.S. 472, 479 (1980). *See also Mills v. Electric Auto-Lite*, 396 U.S. 375, 393-395 (1970) (explaining doctrine); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939); *Skelton v. General Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 53 (1989). Under the latter, Congress has explicitly departed from the "American Rule" that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys fee from the loser," *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), by enacting fee-shifting statutes such as the one at issue in this case, 42 U.S.C. § 2000e-5(k), which provide that the prevailing party is entitled to have its costs, including a reasonable attorney's fee, paid by the loser.

Our cases have described the common fund doctrine and fee-shifting statutes as related exceptions to the American Rule, *see Hamilton v. Daley*, 777 F.2d 1207, 1211 (7th Cir. 1985), but have also stressed the distinctions between them. *See Skelton*, 860 F.2d at 252-255. We have held that a common-fund recovery is allowable in class actions brought under the Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312, despite that Act's fee-shifting provision, 15 U.S.C. § 2310(d)(2). *See Skelton, supra*, 860 F.2d at 254-55. But we have also held

that no common-fund recovery is allowable where the prevailing private plaintiff may obtain fees from the government pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. *Holbrook v. Pitt*, 748 F.2d 1168, 1174-75 (7th Cir. 1984). Recent Supreme Court decisions suggest, but do not hold, that common fund recoveries should not be allowed in Title VII and civil rights cases, because, like limiting attorney's fees in these types of actions to the amount agreed upon between a plaintiff and her lawyer in a contingent-fee contract, allowing recoveries from a common-fund would place "an undesirable emphasis . . . on the importance of the recovery of damages." *Bergeron*, 489 U.S. at 95. This focus on damages would contradict Congress's purpose in providing for fee-shifting in these cases, which was "to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive and declaratory relief." *Id.* Indeed, since fees paid out of a common fund are only available in multi-plaintiff actions, the widespread use of common-fund recoveries as a source of fees for lawyers in Title VII or civil rights cases would not only skew the incentives of plaintiffs' lawyers toward damages rather than equitable remedies, but also toward class actions rather than suits by individuals.

Whatever the ultimate resolution of this issue, we decide that the district court was correct to rule that it was unnecessary to allow *both* a recovery from the defendants and the common fund in this case.[4] Numerous cases have

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[4] We note that resolution of this issue would be particularly inappropriate here, where the class plaintiffs who would be harmed were we to allow plaintiffs' counsel to share one-quarter of the damages they obtained in this suit are not parties to this appeal. Nominally, of course, they are, because of the legal fiction that in a fees case, the lawyer seeking fees is acting on her client's behalf. The situation in which a lawyer seeks fees not from a defendant but rather from her clients stretches this fiction to its limits.

applied the methodology used to calculate fees under fee-shifting statutes in the common-fund context. *See, e.g., Brown v. Phillips Petroleum*, 838 F.2d 451, 454-55 (10th Cir. 1988), *cert. denied*, 488 U.S. 822 (1988); *Bebchick v. Washington Metro. Area Transit Auth.*, 805 F.2d 396, 403 (D.C. Cir. 1986); *Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 505 & n.15 (2d Cir. 1980).[5] In this case, that methodology, properly applied by the district court, led it to the view that plaintiffs' counsel did not merit either an enhancement for contingency or a share of the common fund. In rejecting both these requests, the district court concluded that a reasonable attorney's fee in this case could be reached through the use of the lodestar method, without adjusting the lodestar figure upward either by assessing additional fees against the defendant in the form of an enhancement for contingency or by awarding plaintiffs' counsel an additional benefit in the form of a share of the proceeds of the suit. We cannot say that this decision was an abuse of discretion or that the fee arrived at was unfair given the effort involved in this litigation and the limited success plaintiffs' counsel enjoyed.

V. CONCLUSION

For the foregoing reasons, the decision of the district court is

AFFIRMED.

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[5] The continued advisability of using the fee determination methodology employed in civil rights (and by extension, Title VII) cases in common fund cases has been called into question by language in a footnote in the Supreme Court's opinion in *Blum v. Stenson*, 465 U.S. 886 (1984). In *Blum* the court wrote that "[u]nlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonable expended on the litigation." *Id.* at 900 n.16; *see State of Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (discussing *Blum* footnote).

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3456

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs-Appellants,

v.

CITY OF EVANSTON, et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 84 C 2718 **James B. Zagel,** *Judge.*

[August 14, 1991]

JUDGMENT — ORAL ARGUMENT

HON. JOHN L. COFFEY, Chief Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3456

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs-Appellants,

v.

CITY OF EVANSTON, et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 84 C 2718 **James B. Zagel,** *Judge.*

[October 24, 1991]

ORDER

HON. JOHN L. COFFEY, Chief Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs,

84 C 2718 *v.*
CITY OF EVANSTON, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

There is before me a dispute over fees. Kenneth Flaxman seeks fees for 458 hours and Elizabeth Dale for 147 hours (all figures in this order are rounded). The plaintiff did not previal on any issue on appeal. The defendant did prevail on the principal issue it raised. The 86 hours spent by Kenneth Flaxman and the 42 hours spent by Elizabeth Dale on appeal are disallowed. After those hours are deducted, Flaxman's claim is 372 hours and Dales' is 105 hours.

In order to determine whether these ours are excessive I have closely examined, at the request of defendants, two specific areas of counsel's work — the preparation of findings of fact and the summary judgment motion. It is my practice to conduct a close examination of two or three particular tasks performed by counsel claiming fees and to apply the findings made there to the remaining hours claimed. Counsel are informed of this practice and counsel opposing the fee is permitted to suggest the specific work that ought to be scrutinized. This sampling procedure operates on the reasonable premise that a lawyer's billing and work habits and practices are, in fact, habits and practices which will uniformly apply to all of the lawyer's work.

In judging the appropriate number of bonus hours I take into consideration that plaintiff here bore the burden of proof in this case and that one who bears such a burden may well be required to work a significantly larger number of hours than counsel for the defendant. Thus the claim here is not limited to the 193 hours

defendants' counsel spent on the trial.

The 61 hours to prepare findings of fact is somewhat excessive. Giving due weight to the circumstances of the case and, after rereading the submitted papers, I find that 35 hours is the maximum amount a reasonable attorney would have had to spend to prepare them. The 78 hours to prepare the summary judgment motion 55 for Flaxman, 23 for Dale) are more defensible. The motion was not successful, but in this case was a reasonable step for counsel to take. After rereading the motion I regard total of 63 hours to be an appropriate expenditure of time to prepare the motion. I am not given sufficient detail to decide who did what work on the motion, so I cannot decide to what extent Flaxman's work as opposed to Dale's work was unnecessary. Of the total hours claimed in these two areas — 139 — I have found that 98 hours or 70% were reasonable. I therefore find that 70% of Flaxman's hours are reasonable — 260 hours; and that 70% of Dale's hours are reasonable — 74 hours.

Should a multiplier be used to increase the fee? A fee may be enhanced for contingency, an upward adjustment to compensate for risk, and plaintiff's counsel say they deserve one here. Defendant says that there ought to be a downward adjustment because of the lack of success, since plaintiffs gained so little relief and lost on two major issues they raised (i.e., validity of the test, scope of relief). The positions offset each other. Plaintiffs have achieved something of value to themselves and to future applicants, and there is reason to encourage counsel to take such cases even when the prospect of money damages and individual hiring preferences is not likely to be great. On the other hand, much of the effort was wasted, and no incentive (but rather a disincentive) is needed for such efforts. Neither upward nor downward adjustment is required here and, to the extent, there is discretion, I find that neither adjustment ought to be made.

What fee ought to be awarded then? Plaintiffs' counsel suggest historical rates accompanied by interest for delay in payment and to compensate for the loss of the money's use. I prefer to award current rates for all of the hours — allowing the increase in current rates to compensate for the loss of interest on past, lower rates. Flaxman seeks fees of $205.00 per hour, and Dale seeks fees

of $150.00 per hour. Defendants' counsel charged about $125.00 per hour, but plaintiffs' counsel had continuing work with Evanston and he was, presumably, paid as he billed his fees. Based on the Court's experience and fee awards in other cases for attorneys of the experience and skill of Flaxman and Dale, I conclude that a reasonable hourly rate for Flaxman is $175.00 per hour, and for Dale, $120.00 per hour.

I therefore award fees to Kenneth Flaxman in the amount of $43,500.00, and to Elizabeth Dale in the amount of $8,880.00.

Dated: August 30, 1990

/s/ James B. Zagel
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs,

84 C 2718 *v.*
CITY OF EVANSTON, et al.,

Defendants.

ORDER

Upon reconsideration of my prior ruling with respect to the attorney's fee petition, I adhere to my prior ruling except in compensable hours billed by 30% and I regard it as reasonable — not arbitrary or unfair. There are no fees due for appeal. The work on appeal was not related to the victory at trial. The one aspect of the appeal where plaintiff was required to defend its victory was the one aspect of the appeal which was lost by plaintiff. And even that defense would not have been required if plaintiff had not pursued his own unsuccessful appeal — Evanston did not appeal its loss, it cross appealed after plaintiffs did. The $175.00 per hour fee set for Mr. Flaxman's services may, however, be too low in light of the fact that I used current billing rates for all hours billed (to compensate for delay in payment). In light of the reported cases and the affidavits and materials cited by Mr. Flaxman, I find that his fee should be $200.00 per hours.

Mr. Flaxman also requests distribution of additional compensation from the common fund. He seeks 25% of the backpay pool. I find that distribution of the backpay pool will be less costly if it is performed by the City of Evanston which has offered to assume the responsibility for so doing. I see no reason to permit counsel to share in the backpay pool. If the backpay pool is improperly administered, plaintiff's counsel may seek relief from this court and, if successful, will be awarded further fees for that work. Plaintiff's counsel will be awarded fees of $1,190.00 and costs of $86.20 for its work with respect to disbursement of the backpay pool.

For reasons stated in the opinion of August 30, 1990 and those stated herein, I order the City of Evanston to make

Payment to Kenneth Flaxman of $49,350 in attorney's fees.

Payment to Elizabeth Dale of $9,120 in attorney's fees.

Payment to Kenneth Flaxman of $86.20 in additional costs.

Distribution of the backpay pool to members of the plaintiff class in accordance with the court's previous order.

Dated: October 11, 1990

/s/ James B. Zagel
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs,

v.

84 C 2718
CITY OF EVANSTON, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff, Charlene Evans[1] has sued defendants, the City of Evanston and the Director of Personnel of the City of Evanston, in a two-count Amended Complaint alleging (1) violation of Title VII of the Civil Rights Act, as amended, (''Title VII'') 42 U.S.C. s 2000e, et seq. (Count One); and (2) deprivation of plaintiff's liberty in violation of the due process clause of the fourteenth amendment to the United States Constitution (Count Two). Defendants now move to dismiss under Fed.R.Civ.P. 12(b)(6). For the reasons stated in this Memorandum Opinion and Order, defendants' motion is denied.

Facts[2]

In 1981, Charlotte Evans applied for the job of firefighter with the City of Evanston. At that time, she took a physical agility

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1. There is presently before this Court a motion for class certification. That motion, however, has not yet been fully briefed.

2. On a motion to dismiss, all well-pleaded allegations of the Complaint are taken as true, and all reasonable factual inferences are drawn in the plaintiff's favor. *Mathers Fund, Inc. v. Colwell Co.*, 564 F.2d 780, 783 (7th Cir.1977). Thus, the facts stated are as pled by plaintiff.

test, consisting of five events which are intended to simulate the normal duties of a firefighter: (1) aerial ladder climb, (2) ladder climb, (3) ladder carry and set-up, (4) hose connect, and (5) obstacle course. The test was scored by the total time in which an applicant completed the five events. Evans completed the physical agility test within twenty minutes and received a passing score. She then passed a written examination and was placed on a final list of eligible candidates, but her name was not reached.

Evans reapplied for the position of firefighter with the City in 1983, when the next firefighter examination was given. The 1983 physical agility test consisted of the same events used in the 1981 examination. Prior to taking the physical agility test, Evans attended an orientation session sponsored by the City of Evanston. At this session, Evans was informed that any applicant who successfully completed all events would receive a passing score and be permitted to take the written examination. Also prior to the test, Evans received a two-page written "Firefighter Applicant Information Summary" which described the physical agility test and stated: "Whether you pass or fail the [physical agility] examination will be determined by the total time to complete all of the exercises, including rest time."

Evans completed the 1983 physical agility test in a total time of fourteen minutes and forty seconds, improving by more than five minutes upon her 1981 time. Even so, Evans was informed that she had failed the 1983 physical agility test. The cut-off passing time was determined upon the application of standard deviations to the 1983 scores. The 1983 physical agility test was taken by 793 males, of whom 738 (or 93%) passed, and 39 females, of whom 5 (12.38%) passed.

On January 16, 1983, Evans filed a formal grievance with the City of Evanston, which was denied in a written finding dated March 19, 1984. Evans filed a timely charge of employment discrimination with the EEOC and a "right to sue" letter was issued on September 14, 1984.

The Title VII Claim

Count Two of the Amended Complaint alleges that plaintiff and other female applicants who took the 1983 physical-agility test

were denied equal employment opportunities in violation of Title VII because the test was not job related and it had a disparate impact upon female applicants. Defendants move to dismiss Count Two on the grounds that plaintiff has failed to properly allege intentional and purposeful discrimination and thus, they argue, has failed to state a cause of action under Title VII.

Defendants have misinterpreted the requirements of Title VII. Although Evans does not specify which section of Title VII she relies upon, the Amended Complaint states a cause of action under Section 703(a)(2) of Title VII, which provides in pertinent part:

> It shall be an unlawful employment practice for an employer--
> * * *
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. s 2000e-2(a)(2).

Under the Supreme Court's construction of this provision, relief is provided based upon disparate impact alone. *E.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Dothhard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982).

Griggs and its progeny have established a three-prong analysis for disparate impact claims. To establish a prima facie case of disparate impact, a plaintiff need only show that a facially neutral policy had a disproportionate impact on a protected group. If the plaintiff succeeds, then the employer must demonstrate that the policy is job related. Even in such a case, however, the plaintiff may prevail by showing that the policy is a mere pretext for discrimination. *Connecticut v. Teal*, 457 U.S. at 447, 102 S.Ct. at 2531 (and cases cited therein). Proof of discriminatory motive is simply not required under a "disparate-impact," as opposed to a "disparate treatment," theory. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977).

Plaintiff in the instant case has pled satisfactorily a disparate impact claim under Title VII. She has shown that the administration and grading method of the physical agility test had a disproportionate effect on women applicants: in 1983, 93% of the male applicants passed the test, as compared to less than 13% of the female applicants.[3] Defendants argue that the test is job related because it consists of tasks required to be performed during normal firefighting duties. The plaintiff, however, asserts in the Amended Complaint that the test, at least as it was graded, is not job related because it measures only speed and fails to take into account foresight, endurance, and pacing, which are also essential to performance of the job of firefighter. On the pleadings, then, the City of Evanston has failed to rebut the plaintiff's prima facie case of a Title VII violation. For this reason, defendant's motion to dismiss Count Two is denied.

The Due Process Claim

Count One of the Amended Complaint alleges that plaintiff Evans was deprived of her liberty without due process of law in violation of the fourteenth amendment. Defendants move to dismiss the fourteenth amendment claim on two separate grounds. First, defendants confuse the two branches of the fourteenth amendment. They devote an inordinate amount of effort to citing cases which establish that purposeful discrimination is an essential element of an equal protection claim and arguing that plaintiff has failed to allege facts necessary to prove intentional discrimination. Because the fourteenth amendment claim in the Amended

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3. Section 4(d) of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission provides that a selection rate that is less than 80% of the rate for the group with the highest selection rate is evidence of adverse impact. 29 C.F.R. s 1607.4D (1981). *See also Connecticut v. Teal*, 457 U.S. 440, 443 n. 4, 102 S.Ct. 2528-29 n. 4 (1982); *United States v. City of Chicago*, 663 F.2d 1354, 1367 n. 8 (7th Cir.1981).

Complaint is based solely on the due process clause, defendants' argument on this ground is irrelevant.[4]

Defendants also, however, imply that the due process claim should be dismissed because the "liberty interest" of which plaintiff claims she was deprived does not exist.[5] Plaintiff alleges that she has a "liberty interest" in being permitted to take the written examination after successful completion of the physical agility test. Because an instructor at the orientation session allegedly informed the class that any applicant who completed all of the events in the physical agility test would receive a passing grade and be permitted to take the written examination, plaintiff claims she was deprived of her liberty without due process of law by the Director of Personnel's actions in either changing the manner of grading the physical agility test or, in the alternative, failing to train or supervise the orientation session instructor.

The courts follow a two-step analysis when assessing due process claims. First, a plaintiff must identify a life, liberty, or property interest within the meaning of the clause; and second, the degree of process due must be determined. *Shango v. Jurich*, 681 F.2d 1091 (7th Cir.1982). Plaintiff must demonstrate that her

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4. Perhaps this confusion is rooted in the fact that the original Complaint did contain an equal protection claim. Counsel for plaintiff, however, moved for leave to file an Amended Complaint in order to substitute a Title VII "disparate-impact" claim for the equal protection count as soon as plaintiff received an EEOC "right to sue" letter. It is the Amended Complaint which defendants move to dismiss.

5. Defendants have not actually addressed plaintiff's claim of a "liberty interest." Instead, they argue that plaintiff had no vested "property interest." Although plaintiff in her briefs also speaks of a property interest, the Amended Complaint only asserts that plaintiff has been deprived of liberty without due process. Because the cited case law still applies, this Court chooses to address the applicable argument.

claimed liberty interest is grounded in "state law, a well-established understanding between the parties, or a course of conduct which creates substantial limits on the discretion of state individuals." *Bara v. Aurora Civil Service Commission of City of Aurora, Illinois,* 580 F.Supp. 212, 214 (N.D.Ill.1983). Although the due process claim may be inartfully pled, this Court finds that plaintiff has a liberty interest in engaging in the occupation of firefighter which the City of Evanston may not arbitrarily take from her.

The Seventh Circuit established in *DiIulio v. Board of Fire and Police Commissioners of City of Northlake,* 682 F.2d 666 (7th Cir.), cert. denied, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982) that there is a liberty interest in "engag[ing] in any occupation" which the government may not arbitrarily take from an individual. Thus, the court found that where police officers are promoted based on a promotion examination, that examination must be rationally related to the qualifications of the police sergeant job. Id. at 669. Defendants' citation of *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), is inapposite here. In *Bishop,* the Court held that the discharge of a public employee whose position was terminable at will did not deprive the plaintiff of his liberty. In both *DiIulio* and the instant case, however, unlike in *Bishop,* there was a limit to the discretion of the municipal officials making the personnel decisions: here, individuals became eligible for the position of firefighter upon passing two objective examinations.

Thus, in this case, as in *DiIulio,* plaintiff has a liberty interest in the firefighter position so that the eligibility examinations must be rationally related to the qualifications of the firefighter job. Because the Amended Complaint does allege that the physical agility test, as administered, was arbitrary, defendants' motion to dismiss Count One of the Amended Complaint is denied.

Dated: Jan. 16, 1985.

/s/ Ilana D. Rovner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs,

v.

84 C 2718
CITY OF EVANSTON, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

In this action, plaintiff challenges a physical agility test used by the City of Evanston ('Evanston') and the Director of Personnel of Evanston ('Director') in the application process for Evanston's fire department. In 1983, plaintiff was denied a firefighter position by Evanston because she did not pass the challenged test. In Count I of her amended complaint, plaintiff claims that she was deprived of her liberty interest in violation of the Fourteenth Amendment to the United States Constitution. In Count II, plaintiff asserts that she and other female applicants who took the 1983 physical agility test were denied equal employment opportunities in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. s 2000e, et seq. Count I seeks damages on behalf of plaintiff and Count II seeks injunctive relief for all female firefighter applicants.

Presently before this Court is plaintiff's motion, pursuant to Fed. R. Civ. P. 23(b)(2), for class certification of her Title VII claim. Plaintiff seeks to bring Count II both individually and on behalf of the 32 other women who failed the 1983 test. For the reasons stated below, plaintiff's motion for class certification is granted.

Facts

In 1981, Charlene Evans applied for the job of firefighter with the City of Evanston. Because Evans met the minimum qualifications, the City invited her to participate in a physical agility test. This test, administered to all applicants, consisted of: (1) aerial ladder climb, (2) ladder climb, (3) ladder carry and set-up, (4)

hose connect, and (5) obstacle course. The test was scored by the total time in which an applicant completed the five events. Upon passing the physical agility test, the applicant was permitted to take a written examination. Evans completed the physical agility test within 20 minutes and received a passing score. She then passed the written examination and was placed on a final list of eligible candidates, but her name was never reached.

Evans reapplied for the Evanston firefighter position in 1983, when the next firefighter examination was given. The 1983 physical agility test consisted of the same events used in the 1981 examination. Prior to administering the 1983 physical agility test, Evanston offered an orientation session for the applicants. At this session, the session instructor allegedly informed Evans that any applicant who successfully completed all the events would receive a passing score and be permitted to take the written examination. In addition, however, the applicants received a two-page written 'Firefighter Applicant Information Summary' which described the physical agility test and stated: 'there will be no running permitted during the exam as it will be timed. Whether you pass or fail the examination will be determined by the total time to complete all of the exercises, including rest time.'

Evans completed the 1983 physical agility test in a total time of 14 minutes and 40 seconds, improving by more than five minutes upon her 1981 time. Even so, Evans was informed that she had failed the 1983 physical agility test. The cut-off passing time was determined by the application of standard deviations of the 1983 scores. The 1983 physical agility test was taken by 793 males of whom 738 (or 93%) passed, and 39 females of whom five (12.38%) passed.

On January 16, 1983, Evans filed a formal grievance with the City of Evanston, which was denied in a written finding dated March 19, 1984. Evans filed a timely charge of employment discrimination with the Equal Employment Opportunity Commission ('EEOC') and a 'right to sue' letter was issued on September 14, 1984.

Discussion

Plaintiff seeks class certification under Fed. R. Civ. P. 23(b)(2). In order to be maintained as a class action, the instant

action first must satisfy the prerequisites of Rule 23(a), which states:

> Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
> Fed. R. Civ. P. 23(a).

Second, a class action must have the characteristics described in one of the subsections of Rule 23(b). Under 23(b)(2):

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.
> Fed. R. Civ. P. 23(b)(2).

Courts consistently have held that class certification is within the sound discretion of the trial court. *E.g., In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1129 n.38 (7th Cir.), cert. denied, 444 U.S. 870 (1979). Further, as the Ninth Circuit observed, 'Title VII actions are by their nature class complaints and the requirements of Rule 23(a) should be liberally interpreted and applied 'so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination.'' *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1318 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982), quoting *Gay v. Waiters' and Dairy Lunchmans' Union*, 549 F.2d 1330, 1334 (9th Cir. 1977). At the same time, however, ''a decision to certify should not only advance the substantive goals of Title VII but should also 'advance the efficiency and economy of litigation which is a principal purpose of the procedure.''' *Rosario v. Cook County*, 101 F.R.D. 659, 661 (N.D. Ill. 1983), quoting *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 553 (1974).

Defendants oppose certification on the following grounds: that the class, properly defined, is not sufficiently numerous; that plaintiff's allegations of disparate impact without showing an intent to discriminate do not satisfy the common question nor the typicality requirements; that plaintiff is not an adequate representative of the class because she did not suffer the same injury as that incurred by each member of the proposed class; and that plaintiff has not shown that Evanston acted or refused to act on grounds generally applicable to the class, again because of her failure to allege intentional discrimination.

While this Opinion will address each of the requirements of Rule 23 seriatum, economy dictates that the Court initially address two arguments which defendants erroneously introduce at every opportunity. First, as discussed in this Court's January 16, 1985 Memorandum Opinion in this case, discriminatory intent is not a necessary element of a Title VII 'disparate impact' case. Thus, that plaintiff did not allege unlawful motivation is completely irrelevant to the existence of a Title VII class action. Second, plaintiff only seeks to bring Count II as a class action. In their efforts to discount plaintiff's Rule 23 motion, defendants continually fail to distinguish between Count I, which plaintiff brings individually, and Count II, which she also seeks to bring on behalf of a class.

Numerosity

The first prerequisite of Rule 23(a), that the class be so numerous that joinder is impracticable, must be determined in the context of the particular litigation. There is no definite standard as to the number of class members required to satisfy Rule 23(a)(1). 7 C. Wright & A. Miller, Federal Practice and Procedure, s 1762 (1972). Number alone is not dispositive; small classes have been certified, e.g., *Rosario*, 101 F.R.D. at 661 (class of 20), while larger groups have been denied certification, e.g., *Gay*, 549 F.2d at 1332 (class of 184). Other factors relevant to a finding of impracticability include the nature of the relief sought, the ability of individual claimants to institute their own claims, the practicality of forcing relitigation of a common issue, and administrative difficulties. *Paxton v. Union National Bank*, 688 F.2d 552, 559-61 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983); *Jordan*, 669 F.2d at 1319-20; *Rosario*, 101 F.R.D. at 661.

Defendants contend that plaintiff is 'in a class by herself' because she asserts a misunderstanding of the timing requirements. They argue that because plaintiff's situation is different from that of the other 32 women who failed the 1983 test, the class is not sufficiently numerous. This argument is misplaced; while the existence of an individual count arguably may impact upon the adequacy of representation requirement, see discussion infra at 10, it has no relevance to the numerosity requirement.

This Court finds that plaintiff's Title VII claim satisfies the numerosity requirement. In making this finding, a court may consider whether there exists a large number of future, in addition to present, class members. *Afro American Patrolmen's League v. Duck*, 366 F. Supp. 1095, 1099 (N.D. Ohio 1973), aff'd and remanded, 503 F.2d 294 (6th Cir. 1974). In the instant case, plaintiff requests a permanent injunction, which necessarily will affect the interests of all future female firefighter applicants in Evanston. Further, to require each potential plaintiff to exhaust EEOC procedures and then to initiate or intervene in separate suits would entail obvious administrative difficulties and delay. Therefore, this Court concludes that plaintiff's proposed class is sufficiently numerous that joinder is impracticable.

Commonality

The second prerequisite for class certification is the existence of questions of law or fact common to the class. Rule 23(a)(2) does not require, however, that the dispute raise only common questions of law or fact. 7 C. Wright & A. Miller, Federal Practice and Procedure s 1763 (1972).

> There need be only a single issue common to all members of the class. Therefore, when the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.
> *Edmondson v. Simon*, 86 F.R.D. 375, 380 (N.D. Ill. 1980).

In *Thomas v. Evanston*, No. 80 C 4803, slip op. (N.D. Ill. Feb. 28, 1983), the plaintiff sought class certification in an action challenging the use of a physical agility test in the application

process for the Evanston police department. The Court in *Thomas* held that the commonality requirement was satisfied by plaintiff's allegations that common to the class were questions of whether Evanston's test had a disparate impact on women and whether the procedure amounted to unlawful sex discrimination. Slip op. at 5.

This Court finds that identical common questions exist in the instant case and concludes the plaintiff has satisfied the requirements of Rule 23(a)(2).

Typicality

The third requirement of Rule 23(a) demands that the claims or defenses of the class representative be typical of the claims or defenses of the class. The typicality requirement of Rule 23(a)(3) is met where plaintiff's claim arises from the same event, practice or conduct as the claims of the class members. *Thomas*, slip op. at 6. Typicality refers to the nature of the claim or defense of the class representatives and not to the specific facts upon which it arose. Factual differences will not destroy the typicality of a claim if the claim arises from the same event, practice or course of conduct that gives rise to the claims of the class members and is based on the same legal theory. *Edmondson*, 86 F.R.D. at 381. Plaintiff here, as in *Thomas*, has charged defendant with an unfair employment practice predicated on a test which allegedly discriminates against females. Plaintiff's Title VII claim is grounded in the alleged disparate impact of a specific employment practice, and thus is not special or unique to Evans, but is shared by every woman who has been or would be subject to that practice. Therefore, the typicality requirement of Rule 23(a)(3) is satisfied.

Adequacy of Representation

The final prerequisite for class certification under Rule 23(a) is that the named party will fairly and adequately represent the interests of the class. There are two requirements of the adequacy of representation prerequisite. First, the named party must have both an interest in the outcome sufficient to ensure vigorous advocacy on behalf of the class and no interest antagonistic to that of the class. The second requirement, that counsel for the named party must be a competent and loyal class advocate, is not disputed here.

It is not necessary for the positions of the representative and that of the class members to be identical in order to find coextensiveness of interest; rather, the representative and the class members should share common objectives and legal or factual positions. 7 C. Wright & A. Miller, Federal Practice & Procedure, s 1769 (1972); *Russell v. American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976). Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. 7 C. Wright & A. Miller, Federal Practice and Procedure, s 1768 (1972). The fact that an individual plaintiff 'may have interests which go beyond the interest of the class, but are at least coextensive with the class interest, will not defeat the class.' *First American Corporation v. Foster*, 51 F.R.D. 248, 250 (N.D. Ga. 1970) (emphasis in original). Coextensiveness is present where plaintiff and the class share common objectives and legal or factual positions. *Thomas v. Evanston*, slip op. at 8; *Russell v. American Tobacco Co.*, 528 F.2d at 365.

This Court finds that plaintiff's interest in the action is sufficiently coextensive with that of the class. Thus, plaintiff is an adequate representative of the class.

23(B)(2)

In addition to the requirements of subdivision (a) of Rule 23, a class must fall into one of the categories of subdivision (b) in order to be maintained as a class action. Plaintiff has satisfied all the prerequisites for a class suit; she seeks certification pursuant to Rule 23(b)(2). Rule 23(b)(2) poses two requirements that must be met:

> [t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ..
> Fed. R. Civ. P. 23(b)(2).

The requirement that the party opposing the class must have acted or refused to act on grounds generally applicable to the class is met where the challenged act or omission is premised on a basis which applies to the class. Each member need not be affected. *Thomas*, slip op. at 9; *Davis v. Weir*, 497 F.2d 139, 146 (5th Cir.

1974); 3B Moore's Federal Practice P23.40[2] at 23-290 (2d ed. 1985); 7A C. Wright & A. Miller, Federal Practice & Procedure s 1775 (1972). Here, by using the challenged physical agility test to select firefighter applicants, Evanston has acted or refused to act on grounds generally applicable to the class.

Rule 23(b)(2) next focuses on the relief appropriate to the class. Plaintiff in the instant case requests $10,000 in money damages in her individual claim, and a permanent injunction prohibiting Evanston from discriminating against female firefighter applicants and such further injunctive relief as may be appropriate to make the plaintiff class whole.

When the primary relief sought by the class is an injunction, but plaintiff also seeks monetary damages, a class action under Rule 23(b)(2) may still be upheld. *Rodriguez v. Swank*, 318 F. Supp. 289, 295 (N.D. Ill. 1970), *aff'd without opinion*, 403 U.S. 901 (1971); *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 719-720 (7th Cir. 1969). Thus, plaintiff's claim for money damages does not defeat class certification.

Indeed, plaintiff's allegations fall squarely within the intended ambit of subdivision 23(b)(2), which includes 'actions in the civil rights field where a party is charged with discriminating unlawfully against a class.' Advisory Committee Note, Report of the Judicial Conference on the Proposed Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 98, 102 (1966). Plaintiff has alleged action on the part of the defendants with respect to the class as a whole and, if the allegations of the amended complaint are true, injunctive relief will be appropriate. Therefore, the requirements of 23(b)(2) are satisfied.

For the foregoing reasons, plaintiff's motion for class certification of her Title VII claim is granted.

Dated: November 20, 1985.

/s/ Ilana D. Rovner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs,

84 C 2718 *v.*
CITY OF EVANSTON, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Findings of Fact

1. This case arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. It was certified as a class action on November 20, 1985. The class is thirty-nine women who took Evanston's firefighter physical agility test in 1983.

2. Charlene Evans, plaintiff, a woman residing in this District, took the test on August 6, 1983 and failed it. She has pending an individual damage claim under 42 U.S.C. 1983, but both parties indicate settlement will follow decision of the Title VII claim.

3. The City of Evanston, a municipal corporation, and its Director of Personnel are defendants. Evanston has a population of 74,000 or so and employs 106 firefighters, none of whom are women though it had previously employed two women as firefighters.

4. The jurisdictional prerequisites of prior timely complaint to the Equal Employment Opportunity Commission and timely filing of this complaint after receiving the "right to sue" letter have been met with respect to the August, 1983 test.

5. Evanston begins to hire firefighters by administering a physical agility test. Those who fail are given no further consideration. Those who pass take a written test. After initial hiring the entering firefighters are trained at an Academy used by several municipalities. The Academy instructs these individuals, inter alia, in the proper techniques of performing the physical tasks of firefighting.

6. The physical agility test used in 1983 (and 1981 and 1985 as well) consisted of five events. Persons wishing to be firefighters

were to attend an advance orientation session which plaintiff and others did. A written summary of information was provided. It accurately summarized the physical agility test administered in 1983. The summary stated:

> Examination
> Because this exam is designed to test your physical abilities as it simulates actual tasks/functions performed by firefighters, we urge you to practice. To facilitate your "work-out", listed below, please find a brief description of the exercises you will be required to perform.
>
> 1. Aerial Ladder Climb: Climb to top of the aerial ladder which will be extended to 70 ft. You will wear a coat, air pack and face mask.
>
> 2. Ladder climb: Climb extension ladder twice while carrying a hose pack. You will wear a coat.
>
> 3. Ladder Carry and Set Up: Remove ladder from the side of the engine and carry it to the wall, set up to a climbing angle, remove, carry and return it to the engine. You will wear a coat.
>
> 4. Hose Connect: Connect 2 1/2 inch hose to a fire hydrant, turn the hydrant completely on and off, and disconnect. You will wear a coat.
>
> 5. Agility Course:
>
> a. Drag one section of 2 1/2 inch hose filled with water 50 ft.
>
> b. Climb to the top of the ski hill while carrying a tarp and return via the stairs on the opposite side of the hill.
>
> c. Walk through ten (10) tires while carrying the tarp.
>
> d. Drag one section of 2 1/2 inch hose filled with water 50 ft.

The applicants were informed that the test would be timed. Time was kept beginning with the first event, and the clock was not

stopped until completion of the final event.

6. The physical agility test was devised in 1980 in this way. The test was created by Evanston's then-Director of Personnel and Fire Chief along with David Franzen, then and now, the Division Chief in charge of training. Prior tests had used events such as pushup, pullup and rope climbs. The new tests were to be "completely job related." The method used was to examine their own knowledge of the physical tasks of firefighting which in the case of the training officer consisted of, in addition to the ordinary experience of firefighting, the experience of attending and critiquing all fires in Evanston and keeping records as to the task performed at fires. These post-fire critiques were widely attended by fire officers and individual firefighters. The group considered some of the appropriate literature on qualifications and the physical agility tests actually used throughout the immediate area. Two of the members of the group were clearly experts in firefighting. The Director of Personnel, who was not such an expert, attended several fires during the period when the test was developed. The group also conferred with other members of the Evanston Fire Department. The group prepared a test using physical actions they found to be important to firefighting. The test, once devised, was then administered to all incumbent firefighters under the age of thirty-five whose performances were timed. Timing of the tests was done because speed of performance is an important element of effective firefighting.

6A. The work of the group did not result in a written form of occupational analysis sometimes seen in this area of personnel administration. These types of analyses usually list each of the various physical (and, where appropriate, mental) operations organized in some logical fashion accompanied by an analysis of the frequency and importance of their proper performance in the occupation. Often this is done by written surveys of incumbents using a list of tasks identified by subject matter experts. See *Guardian's Association v. Civil Service Commission,* 630 F.2d 79 (2nd Cir.1980). It is apparent that this method was not used or, at least, that evidence of its use does not exist. A written job analysis was not presented at trial.

7. Evans completed the 1983 test in 880 seconds (14 minutes, 40 seconds). Evanston selected a cut-off score by passing all those within one standard deviation above the mean (767 seconds). The exact number of persons taking the test is stipulated to be 839. It is

also stipulated in one place that 38 women took the test and, in another, that 39 took the test. The defendants now submit that only 832 took the test. The differences in the stipulations are immaterial. The overall passing percentage rate was in the high eighties. Male applicants passed at a rate of over 90% and female applicants at a rate of less than 16%.

8. It is unclear that Evanston had consistently applied the same method of determining the cut-off point. In 1985 when the cut-off was 915 seconds, it appears to be nearly three standard deviations above the mean. In 1981 it was stipulated that the cut-off score was 890 seconds, but there is truthful testimony by the current Director of Personnel, Judith Witt, that, in 1981, she deducted a constant number (which she does not recall) from the score of the four women who took the 1981 test. This deduction enabled three of their four (including Evans at 889 seconds) to achieve passing grades.

9. The parties have stipulated that the passing rate for women on the 1983 tests is less than 80% of the passing rate for men on the same test and that the discrepancy "is statistically significant: that the likelihood that the difference in male and female passing rates arose from chance is less than one chance in a billion."

10. Evanston hired nine persons, all male, from among those who took the 1983 test; most were hired on May 7, 1984.

11. To the extent that in the following passages there are sentences which are findings of fact rather than conclusions of law those sentences shall be deemed findings of fact.

Analysis, Further Findings of Fact and Conclusions of Law

I. Here this Court must follow the standard "... approach to disparate impact cases set forth in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and its progeny. To establish a prima facie case of discrimination, 'a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.' *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726-27, 53 L.Ed.2d 786 (1977). When a plaintiff makes this threshold showing of disparate impact, the employer bears the burden of showing that its discriminatory policy or practice is necessary and manifestly related to job performance. Id.; *Griggs*, 401 U.S. at

431-32, 91 S.Ct. at 853-54. If the employer satisfies its burden, the plaintiff may show that less discriminatory alternatives would also 'serve the employer's legitimate interest in "efficient and trustworthy workmanship."' *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975), quoting, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973); ..." *Thomas v. City of Evanston*, 610 F.Supp. 422, 427 (N.D.Ill.1985); *Evans v. City of Evanston*, 621 F.Supp. 710, 712 (N.D.Ill.1985) (Rovner, J.). Less discriminatory alternatives are not at issue in this case. As stated in Plaintiff Reply To Proposed Finding of Fact and Conclusions of Law, "Plaintiffs agree that some sort of physical agility test should be given [to firefighter applicants]." (Reply H, citing testimony of Plaintiffs' expert Spetz.)

II. Evanston contends that there is no initial showing of adverse impact noting correctly that the "80% rule" is a guideline, not a legal definition of adverse impact. The rule comes from the EEOC Guidelines (29 CFR, pt 1607) adopted in 1978 by the EEOC, the Civil Service Commission, the Department of Labor and the Department of Justice. It says adverse impact is demonstrated by a selection rate for any race, sex or ethnic group which is less than four-fifths or 80% of the rate for the group with the highest rate of selection. Violation of the guideline, however, does ordinarily establish a prima facie case of disparate impact discrimination. See *Connecticut v. Teal*, 457 U.S. 440, 443, n. 4, 102 S.Ct. 2525, 2529 n. 4, 73 L.Ed.2d 130 (1982); *United States v. City of Chicago*, 663 F.2d 1354, 1357 n. 8 (7th Cir.1981) (en banc); *Compare Clady v. County of Los Angeles*, 770 F.2d 1421, 1428-29 (9th Cir.1985). And in this case there is more than mere application of the guideline--there is the stipulation that the discrepancy is statistically significant, *(Fudge v. City of Providence*, 766 F.2d 650 (1st Cir. 1985)), and the report of Evanston's expert Shepherd which opined that the 1983 test had an "adverse impact on female applicants." Finally, the margin by which the four-fifth guideline was missed was not close either in terms of final selection for employment or pass-fail rates. *Castaneda v. Partida*, 430 U.S. 482, 496, 97 S.Ct. 1272, 1281, 51 L.Ed.2d 498 (1977). *See Thomas v. City of Evanston*, 610 F.Supp. 422 (N.D.Ill.1985); Schlei and Grossman, Employment Discrimination Law 98-99 (2nd ed. 1983) (1985 Supp. at 18-19).[1]

III. Evanston next asserts that whatever its impact its physical agility test is valid. The EEOC Guidelines provide three methods by which selection procedures might be found valid, to wit, construct validity, criterion validity and content validity.

Criterion validity is established when there is a significant correlation between comparative success in the test and comparative success in job performance. Validity is shown by studies of those who take the test before employment and are hired regardless of the test scores. Job performance is rated after a period of time and job ratings are checked against test results to determine the correlation between the two. Or the test may be administered to those already employed at the job with a comparison again made between test performance and job performance.

Construct validity depends upon correlation between a test and the presence of a trait required for success in the job, i.e., intelligence, judgment.

Content validation occurs when the test involves the performance of tasks actually performed on the job. Those wishing to be typists, stenographers and court reporters usually take content valid tests.

Evanston claims its test is content valid and Evans says it cannot be, and she offers three arguments to which the Court will turn in their logical order.

A. Adequacy of Job Analysis

The principal attack on Evanston's firefighter job analysis is that it is inadequately documented as was the case with Evanston's police officer job analysis. *Thomas v. City of Evanston*, 610 F.Supp. 422 (N.D.Ill.1985). In *Thomas*, Evanston based its job analysis on the inconsistent survey responses of three police chiefs and thirty hours of observation of actual police activities by a graduate student

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1. Judge Rovner also found disparate impact in this case. *Evans v. City of Evanston*, 621 F.Supp 710, 712 (N.D.Ill.1985). It may be that the size of the group going through the test was not large enough to lead to a statistically valid conclusion of adverse impact (See testimony of Dr. Metzcus) but it appears this argument is not pursued here.

riding along with police officers. It is apparent the process here was more encompassing. Two members of the group developing the job analysis were expert firefighters, one of whom had the task of observing and analyzing firefighter performance at each of the fires in Evanston. The one non-expert in firefighting also observed firefighting. Other members of the fire department reviewed the tasks identified by the job analysis group, and the proposed test was administered to many incumbent firefighters.

There is no question that a job analysis could, or perhaps should, have resulted in more documents than Evanston produced here, and Evanston would not have been left in the position of having its job analysis claim dependent upon a Court's finding as to the credibility of oral recollections of the process it used. Nonetheless, this Court does accept, as indicated in Finding 6, the statements of Franzen and others as to the manner in which the test was devised. It is significant that neither Magel nor Spetz, plaintiff's experts, denied that any of the agility tests involved tasks unimportant to firefighting (although Magel did express doubt about the importance of speed in moving a water-filled hose). Nor did any expert state that the physical agility test omitted any activity important to firefighting.

Dr. Magel expressed persuasively the view that a proper job analysis would include quantification of the physiological requirements of a job and that the EEOC Guidelines are inadequate because they do not require physiological quantification. This he attributed to the dominance of psychologists in the development of the Guidelines. The difficulty with accepting Dr. Magel's testimony as a guide to decision here is that it runs contrary to accepted methods of job analysis (as described by Dr. Spetz, plaintiff's other expert) and it is difficult to reject this accepted practice on the opinion of a single authority. In fact, Dr. Magel admitted that, to his knowledge, a full physiological analysis of firefighting has never been done in this country.

The Court finds the City of Evanston has met the minimum standards for performing a firefighter's job analysis and Evans has not shown its invalidity.

B. Adequacy of the Test

Evans's argument really proceeds against the premise of content validity. Her expert, Dr. Magel, testified that the validity of the test here failed because it was constructed without an effort to quantify

the physiological requirements of the job of firefighter. He then testified that the ladder climbs were not valid measurements of leg strength or aerobic capacity, that the ladder setup was not a valid measure of upper body strength, that the agility course was not a good measure of aerobic capacity, and that the hose connect measured only manual dexterity involved in hose connection and disconnection.

This testimony rests on a rejection of the concept of content validity.[2] On this view the only appropriate method of devising a physical test is to identify important tasks, discover the physiological requirements of each and then administer whatever tests are valid for aerobic capacity, and physical strengths in the environments relevant to the job. One premise of this theory is that it eliminates whatever success there is in Evanston's testing that is dependent in part upon training in the specific skills; but, of course, training may be of equal value in success at general tests of aerobic capacity and physical strength. In any event, the fact that one's performance on a test would be improved by training is, despite the suggestion of the Guidelines (14(c)(1)), not a reason to invalidate a test. Guardians Assn. v. Civil Service Comm., 630 F.2d 79, 92 (2d Cir.1980).

Under Evans's theory, one might say of the typist that he or she needs hand and finger speed, and coordination, eye control and the capacity for sustained concentration; and the best way to test these is to measure the physiological requirements of each of these elements in typing and then apply appropriate tests for each. All this rather than ask the candidate to sit and type. Of course, Evans does not argue this proposition, but her evidence suggests something like it. Dr. Magel's position on job analysis and test adequacy may well represent what the Second Circuit viewed as the "danger of too rigid an application of technical testing principles", *Guardians Assoc. v. Civil Service*, 630 F.2d at 90.

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2. This is a fair characterization of the principles espoused by Dr. Magel, who opined that firefighters are good at identifying firefighting tasks but poor at defining construct in firefighting work.

Evans is not to be faulted for making her argument. The training officer, Franzen, on examination by the City expressed the view that the physical agility tests did show dexterity, leg strength, upper body strength and so forth. Despite that testimony this Court believes the essence of Evanston's defense is that (a) firefighters often must speedily climb ladders (wearing coats, face masks, air packs and hose packs), set up ladders, connect hoses, and carry charged hoses and other things up and down and do so while strained and tired, and (b) the City of Evanston wants to see if the applicants can do these things.

The uncontradicted evidence here is that the acts performed in the physical agility test are exactly the sorts of activities a firefighter performs while on duty. With a few trivial exceptions (using tires to serve as obstacles in the street) the tests here require the actual performance of job duties and not the performance of tasks whose analogy to the actual job duties may be more or less strained.

Evans contends that Evanston is really arguing that the tests are "face valid", and this must fail under *Burney v. City of Pawtucket*, 559 F.Supp. 1089, 1101 (D.R.I.). But Evans is wrong. *Burney* did not involve a claim of content validity--the tests there for police cadets involved routine tests of physical fitness (e.g., a run, situp, broad jump)--a claimed criterion for success in police work.

Evanston's expert Dr. Shepherd credibly expressed the opinion that the physical agility test was a good predictor of future performance as a firefighter.

The evidence in this case established the content validity of the Evanston physical agility test.

C. Adequacy of the Cut-off Score

Evans challenges the cut-off score arguing that it has no relation to a proven requirement for firefighting.

The thrust of the evidence on this point is not very clear. Evans's expert Dr. Spetz (who believed cut-off scores should be established for physical agility tests) established that in Evanston the cut-off scores could be defined in terms of the number of standard deviations above the mean score were the following: 1981--1.7, 1983--1.0 and 1985--2.8. Dr. Spetz then expressed the view that 2.8 standard deviations above the mean was not an accepted way of fixing a cut-off score. Dr. Spetz never expressed any view about the method used in 1983, the year in issue here. Evanston's expert Dr. Shepherd simply stated that a cut-off score of one standard

deviation above the mean was a method used frequently. He did not say its use was appropriate. The only expert addressing the issue was Dr. Metzcus, called by Evanston. He expressed the view that one standard deviation above the mean usually permits a pass rate of 84% which he opined was not much of a screen at all. The cut-off score, he believed, was not only reasonable but extremely generous and should have been higher. There is little other evidence on this point. When the physical agility test was administered to incumbent firefighters (under the age of thirty-five) in 1980 the average time was 688 seconds compared to the 767 seconds cut off in 1983. Seven of the thirty-two incumbents would have failed to make the 1983 cut off and two had times slower than the plaintiff's 1983 time. The training officer believed that at least one of the incumbent firefighters was not giving full effort to the test. The training officer also testified he believed the cut off should be 600 or 660 seconds, but he offered no reason why this should be so, and there is no evidence that this opinion was taken into account when the cut off was established.

The cut-off score was not based on a determination of what would be an appropriate completion time. Its sole purpose was to establish some point below which candidates would not be further screened. A figure giving a pass rate of about 84% was selected for this purpose. The results of the incumbent firefighter tests were not used to decide the cut off. Other than the cut-off score it appears no other use was made of the results of the 1983 test. Candidates were not selected in rank order from the test result list, and the nine hired from the 1983 list did not receive the nine fastest scores.

A cut-off score need not be separately validated but should be "reasonable and consistent with normal expectations of acceptable proficiency within the work force." EEOC Guidelines 5H; *Craig v. County of Los Angeles*, 626 F.2d 659, 665 (9th Cir.1980). The Supplemental Information and Overview of the Uniform Guidelines, Para. V, notes that where there is adverse impact "an employer is required to justify the initial cutoff-score by reference to its need for a trustworthy and efficient workforce."

The cases have generally rejected cut-off scores unrelated to job performance. In *Guardians Assoc. v. Civil Service Comm.*, 630 F.2d 79, 105-06 (2d Cir.1980) a cut-off score was rejected which was set to produce the number of passing candidates necessary to fill the available job openings. In *Craig v. County of Los Angeles*,

626 F.2d 659, 665 (9th Cir.1980) a cut-off score was approved because there was evidence that candidates who barely passed the examination displayed correspondingly poor performance in academy training.

Here Evanston adopted its cut off of one standard deviation above the mean because "generally that allows for about 84 percent of the normal applicant pool to pass and that was determined to be in the interest of the City" (Witt). No absolute maximum number of seconds to complete the test for prospective firefighters has ever been established by Evanston though the subject has been under discussion (Witt). The test results of incumbent firefighters were not considered (Haynes). The post-hoc justification for the cut-off score is, in Dr. Metzcus's view, based on statistics and not on the mechanics of firefighting, that a cut-off score eliminating only 16% of applicants is, if anything, too lenient. And Division Chief Franzen opined the passing score should be in the area of 600 to 660 seconds, which opinion was based upon his experience running the incumbent firefighters through the test.

Evanston cites *Gillespie v. Wisconsin*, 771 F.2d 1035 (7th Cir.1985) to support its cut-off score. There Wisconsin administered a written test for entry level personnel officers, "the cut-off point was selected in order that [Wisconsin] could interview as many minority candidates as possible while at the same time assuring that the candidates possessed the minimum skill necessary to perform.... In addition the cut-off score was set so that the interviewers would not be overwhelmed by the sheer number of candidates ...", 771 F.2d at 1045. But Gillespie is of little use to Evanston. There is no claim that the Evanston cut-off score served to prevent overwhelming of an interview process. Indeed the next step in the Evanston process was a written examination. The cut-off score was not defended as an effort to maximize the inclusion of female candidates. There was no effort to correlate in any way the cut-off score with ability to perform as a firefighter. The practice in Evanston involved only the use of a statistical determination of a passing score--the score varied from test to test reaching 890 seconds in 1981 and 915 seconds in 1985. The failure of seven of thirty-two incumbent firefighters (under the age of thirty- five) to meet the cut-off score speaks (though not conclusively) against the validity of that score. The only witness to express a view on a specific cut- off score (Division Chief Franzen on direct

examination by plaintiff) based his view not on the observation of a correlation between fast times and successful training or firefighting, but on his observation of the tests run on incumbent firefighters. Under Franzen's suggested upper limit of 660 seconds, sixteen of the thirty-two incumbents would have failed to make the cut off.

Evans has proved that the cut-off score chosen by Evanston was unjustified.[3]

IV. Remedy. The Court has considerable discretion to devise appropriate relief where employers are found in violation of Title VII, 42 U.S.C. 2000e- 5(g). In this case the appropriate relief is that:

A. The City of Evanston shall be prohibited from using a physical agility test in a way that unlawfully discriminates against female firefighter applicants. Use of the same physical agility test at issue in the proceeding for employment decisions shall be permissible only if this Court approves in advance the establishment of the cut-off score. Notice of intent to seek such approval shall be given to plaintiff's counsel. If the City seeks to devise a new physical agility test, it shall seek court approval in advance of its use and shall notify plaintiff's counsel of its intent to seek such approval. Provisions requiring notification of counsel shall lapse as of December 31, 1990.

B. Under the rule which favors awards of backpay, *Thomas v. City of Evanston*, 610 F.Supp. at 432, the Court orders that all members of the plaintiff's class shall share in an award of backpay, to be distributed on an aliquot basis and compiled on the assumption that, but for the discriminatory test, the class members would have been hired in percentages that equaled their percentage of those taking the test, that is 4.68%. The award would then be 4.68% of the total wages earned by the nine males who were hired

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3. I do not say that the 1983 cut-off score of 767 seconds is unjustifiable. I say it was not justified by Evanston. Evans introduced substantial evidence that the score was not reasonable and consistent with normal expectations of acceptable proficiency in firefighting.

as a result of the 1983 test.

The Court has jurisdiction over the parties and over this controversy, and reserves jurisdiction to enter such orders as may be necessary to implement its decision.[4] Accordingly, judgment shall be entered in favor of the plaintiff class and against the City of Evanston.

Dated: August 19, 1988

/s/ James B. Zagel
United States District Judge

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4. The plaintiff's request for priority for hiring of class members as firefighters subject to a showing of qualification is rejected as vague, neither priority nor qualification being defined. If by priority plaintiff means its class members are to be taken above all other candidates the remedy asks for more than they would have received if the test had not been used. Only 1.1% of male applicants were hired and only 1.2% of males who passed the test were hired.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-2923 and 88-2995

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs-Appellants,
Cross-Appellees,

v.

CITY OF EVANSTON, et al.,

Defendants-Appellees
Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 84 C 2718 **James B. Zagel,** *Judge.*

ARGUED JUNE 16, 1989 — DECIDED July 27, 1989

Before POSNER, RIPPLE, and MANION, *Circuit Judges.*

POSNER, Circuit Judge.

This is a class action under Title VII of the Civil Rights Act of 1964 on behalf of the 39 women who failed the physical agility test given by the Evanston fire department to applicants for firefighting jobs in 1983. Eighty-five percent of the women who took the test failed (only seven percent of the men failed) and were thereby disqualified, and there are no women among Evanston's 106 firefighters although at one time there were two. The test is conceded to have had a "disparate impact" on women. So unless the test (more specifically the method of scoring it — the focus of the plaintiff's attack) serves a legitimate interest of the employer, it violates Title VII. The district judge found a violation and gave judgment for the class. 695 F.Supp. 922 (N.D.Ill.1988). The city

appeals, challenging the finding of liability; the plaintiff also appeals, challenging the adequacy of the equitable relief that the judge ordered. The case was tried before the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), changed the ground rules for disparate impact litigation. In another case decided today, *Allen v. Seidman*, 881 F.2d 375 (7th Cir. 1989), we have offered our interpretation of *Wards Cove*, and rather than repeat it here we shall simply apply it.

The physical agility test that the Evanston Fire Department used in 1983 (and also in 1981 and 1985) consisted of a group of tasks which were to be performed consecutively by each applicant without a break, while wearing a firefighter's uniform. The tasks were: climbing to the top of a 70-foot ladder; climbing an extension ladder twice while carrying a hose pack; removing a ladder from a firetruck, carrying the ladder to a wall, leaning it up against the wall, and then removing it and returning it to the truck; connecting a hose to a fire hydrant, turning the hydrant on and off, and disconnecting the hose; and dragging a section of hose filled with water fifty feet, dragging a tarpaulin to the top of a hill, carrying the tarp through ten tires, and again dragging a section of hose filled with water fifty feet. The test was timed. The mean time in 1983 was 628 seconds, and the Fire Department chose one standard deviation above this mean as the passing score, with the result that anyone who took more than 767 seconds to complete the test flunked.

The physical agility test is only the first hurdle an applicant must clear to become a firefighter. Next come tests of intelligence and of psychological stability, and in the end only nine of the 839 persons who applied for firefighter jobs in 1983 were hired — all men. The fire department's choice of one standard deviation above the mean as the passing score was not consistent. In 1985 the passing score was 915 seconds, which was 2.8 standard deviations above the mean for that year. In 1981 the passing score had been 890 seconds, which was 1.7 standard deviations above the mean, but had been raised in order to enable three of the four women who took the test to pass it.

The district judge found that the test itself was fine, and this is unquestionably correct under the relaxed standard of *Wards Cove*

and is not seriously contested by the plaintiff. The test was designed by firefighters, consists of tasks that faithfully imitate the tasks that firefighters are called on to perform in their work, tests for speed, skill, endurance in (em in a word, aptitude for — performing those tasks, and was pretested on the Evanston firefighter force before being given to applicants. It seems clearly related to the employer's legitimate need for physically strong firefighters, and the plaintiff has suggested no alternative that would serve that need as well yet be less difficult for women. A similar test was upheld in *Berkman v. City of New York*, 812 F.2d 52, 59-60 (2d Cir.1987); see also the earlier opinion in that case reported at 705 F.2d 584, 592 n. 10 (2d Cir.1983).

The rub is in the scoring of the test. Since men are on average stronger and faster than women, the higher the passing score on a test such as Evanston's physical agility test (that is, the shorter the time in which it must be completed) the smaller the percentage of women likely to pass it. To satisfy its burden of producing evidence that the test — which means all aspects of the test including the method of scoring it — served a legitimate employer purpose, the city was obliged to produce evidence that the method of determining who passed the test in 1983 was related to the city's need for a physically capable firefighting force. *Cf. Guardians Association v. Civil Service Commission*, 630 F.2d 79,105-06 (2d Cir.1980); *Thomas v. City of Evanston*, 610 F.Supp. 422, 431 (N.D.Ill.1985).

The city did produce evidence relating to this question but it consisted of little more than testimony that one standard deviation above the mean is a frequent cut-off point on tests and that the cut-off point for the physical agility test was generous to the candidates and quite possibly should have been lower. It is not surprising that Judge Zagel was not persuaded by this evidence. The choice of one standard deviation above the mean was a decision to pass 84 percent of the test takers, and this meant that the passing score would depend on the average performance of those who happened to take it. But the ability to perform firefighting tasks adequately depends not on relative but on absolute test performance. If one year all the applicants were superbly fit, it would be irrational to disqualify the entire bottom 16 percent. For it is not only physical abilities that the fire department is after — as is made plain by the fact that no

preference is given to candidates who do exceptionally well on the physical agility test, as opposed to those who barely pass it. The department wants firefighters who are intelligent and stable, as well as strong and swift. If it cuts off from further consideration persons who are perfectly able physically — although less so than some other applicants who may, however, be their inferiors in intelligence and stability — it is shooting itself in the foot. No explanation was offered, moreover, for why different pass rates were selected in 1981 and 1985, the effect being to enlarge markedly the time allowed to complete the test compared to what it had been in 1983. There was some evidence that the weather was bad in 1985, but that would explain only why the mean would be higher — not why the department would allow a higher number of standard deviations above the mean.

One would think the rational way of scoring the physical agility test would be to determine the maximum time in which a firefighter who had no training or practice — for remember that the test is for applicants — ought to be able to complete the test, and make that the cut-off point. Applicants who passed the test would then take the other two tests (intelligence and stability), which presumably would have their own cut-offs. Among those who passed all three tests, those whose composite score, weighted by the relative importance of the tests, was the highest would be hired. This was not the procedure followed by the Evanston Fire Department (the record is unclear on what procedure was followed), and no satisfactory reasons for departing from it were presented.

So feeble was the city's effort to justify the cut-off point for the physical agility test that it can be argued that the city did not even carry its burden of production. But we reject this argument. The plaintiff had challenged the entire test, and the city put in a great deal of justificatory evidence which succeeded in justifying everything about the test except the scoring method. That was enough to satisfy the burden of production and shift inquiry to whether, with all the evidence in, the plaintiff proved — since after *Wards Cove* it is the plaintiff that has the burden of persuasion — that the test, because of its method of scoring, did not serve the legitimate ends of the employer but instead unreasonably excluded women. On this issue the district judge should have first crack, for while it is quite likely that he thought the scoring method no good,

we are given pause by the following statement in his opinion: "I do not say that the 1983 cut-off score of 767 seconds is unjustifiable. I say it was not justified by Evanston." 695 F.Supp. at 929 n. 3. This is, or at least may be, the language of burden of persuasion; and if that is what it is, the judge (quite understandably, considering the state of the law when he decided the case) placed the burden on the wrong party. There must be a remand for reconsideration in light of *Wards Cove*, and Judge Zagel may if he wants take additional evidence to help him answer the question whether the plaintiff has shown that the method of scoring the test was unreasonable under the standard of that decision.

If Judge Zagel again finds the method of scoring to be unlawful, the issue of the appropriate scope of equitable relief will recur, so we shall consider the plaintiff's challenge to his order now. The judge ordered the city to submit for his consideration a new test (or rather a new method of scoring the old test), and neither side questions that relief. But he refused to order the city to hire any of the members of the plaintiff class or even to allow them to advance to the next test. The plaintiff argues that those class members whose times of completing the 1983 test were within the passing range on the 1985 test (915 seconds, compared to only 767 in 1983) should be excused from having to retake the physical agility test and be allowed to move on to the other tests.

Judge Zagel was within his remedial discretion in declining to take this step. When he issued his order, it was five years since the class members had taken the physical agility test, and they offered no evidence that their agility had not declined in the interim. The importance of competent firefighting to the safety of the people of Evanston, as well as of the firefighters themselves, whose safety depends in part anyway on each other's physical fitness and agility, justified the city in insisting that all applicants have taken the test in the recent rather than remote past. An equity court must always consider the possible impact of a decree on innocent third parties. *See United States v. City of Chicago*, 870 F.2d 1256, 1262-63 (7th Cir.1989), and cases cited there.

While there is much talk in the cases about "make whole" relief, see, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-22, 95 S.Ct. 2362, 2372-74, 45 L.Ed.2d 280 (1975); *Franks v.*

Bowman Transportation Co., 424 U.S. 747, 762, 96 S.Ct. 1251, 1263, 47 L.Ed.2d 444 (1976), this talk has reference to cases where it is reasonably clear that, had it not been for the discriminatory behavior, the plaintiff would have got (or retained) the job or other employment benefit in issue, and where making the plaintiff whole would not unduly injure innocent third parties. *Cf. Martin v. Wilks*, ___ U.S. ___, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). The second condition would be met in this case if the relief took the form of backpay, but not the first. As only 1.2 percent of the applicants who passed the Evanston fire department's physical agility test were actually hired, what the class members lost was not a job but a long-shot chance at a job. They will be restored to the place they would have occupied if they pass a new physical agility test approved by the district court. Depending on their performance on that test and on the other tests required of applicants, they may eventually be in a position to show that but for unfair scoring of the 1983 test they would have been hired in 1983, and if so they can then claim additional backpay. The judge awarded a tiny amount of backpay, computed as follows: women were 4.68 percent of the applicants in 1983, so he awarded them an amount equal to 4.68 percent of the salary of those who were hired. In awarding this amount the judge was discounting backpay by (a measure of) the probability that the women would have obtained the pay but for the discriminatory scoring of the physical agility test; the analogy is to damages for loss of life expectancy, on which see *DePass v. United States*, 721 F.2d 203, 206-10 (7th Cir.1983) (dissenting opinion), and references cited there. Whether this is a proper form of equitable relief either generally or under Title VII, and if so whether the judge used a proper measure of the probability that the women would have been hired, are not issues we need resolve, since the defendants do not challenge the judge's award of backpay. However, the additional relief that the women have sought and the judge denied probably is premature and certainly was not required as a matter of law.

The case is remanded for further consideration in light of this opinion. Circuit Rule 36 shall not apply on remand.

VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLENE EVANS, INDIVIDUALLY AND
ON BEHALF OF A CLASS,

Plaintiffs,

84 C 2718 *v.*
CITY OF EVANSTON, et al.,

Defendants.

ORDER

This case is before the Court on remand from the Court of Appeals, *Evans v. City of Evanston*, 881 F.2d 382, 385 (7th Cir. 1989). The Court, having considered the additional evidence presented by defendants and having heard the written and oral arguments of counsel, continues to be of the opinion that defendant's method of scoring the test is unlawful. Accordingly,

IT IS ORDERED that judgment, in accordance with the Court's findings of fact and conclusions of law dated August 19, 1988, be, and the same hereby is, entered in favor of the plaintiff class and against defendant City of Evanston.

IT IS FURTHER ORDERED that the City of Evanston may continue to use the same physical agility test at issue in this case for employment decisions in its fire department provided, however, that the passing time for the test shall be not less than 780 seconds, unless the test is administer- ed in rainy conditions or when the temperature is equal to or greater than ninety degrees Fahrenheit, in which case the passing time shall be not less than 900 seconds.

IT IS FURTHER ORDERED that, pursuant to agreement of the parties, judgment shall be entered in favor of Charlene Evans and against defendant City of Evanston in the amount of two thousand five hundred dollars ($2500) on the individual claim asserted by Evans in her complaint.

The Court retains jurisdiction to enter such orders as may be necessary to implement its decision, including but not limited to the

backpay provision of the decree.

Dated: March 22, 1990

/s/ James B. Zagel
United States District Judge